

R E M A R K S

UPON THE

SCOTS BANKRUPT BILL.

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REMARKS

UPON THE

SCOTS BANKRUPT BILL,

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R E M A R K S

U P O N T H E

S C O T S B A N K R U P T B I L L.

IN the opinion of the writer of the following remarks, the bill does honour to the accuracy, industry and knowledge of those who framed it; but he thinks, at the same time, that it admits of improvement. He has not seen it in any other shape than as it was printed for the House of Commons last session, and that but lately; nor has he had an opportunity of conversing with any intelligent person on the subject. If he had, part of what follows might probably have been spared,

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red,

red, as already started and obviated, proposed and rejected. If his information be right, that a gentleman at the head of the Scots bar takes a particular charge of this business, he is certain that every hint upon a subject of such general concern and importance, will be attended to; and such is his opinion of that gentleman's candour, abilities and judgment, that if the amendments here suggested are neglected, he will conclude they merit no regard. To waste the time of those for whose perusal the remarks are principally intended, would be unpardonable, and therefore, without further preface, they shall be submitted in the order they occurred on reading the bill.

- I. It is not easy to determine to what description of men the bankrupt laws ought to extend, as is evident from the changes which the English statutes have undergone upon this point from the time of Henry the VIII. to the present; and how difficult it is to express the idea with precision, even when

when fixed, is apparent from the many questions which have arisen, and daily occur in England, on the construction of this part of the statutes. That the law ought not to reach every description of men, is now admitted even in Scotland, after the experience of ten years has taught us, that in the statute of the 12th of his present Majesty, we had better have copied more closely the English law, which excepted the owners and occupiers of land not engaged in commerce.

THE description in the bill is, “ *A* Page 4th.
person being a merchant, or trader in gross or by retail, or a banker, broker, or underwriter, or a manufacturer, artificer, or mechanic, and in general any person, who, either for himself, or as agent or factor for others, deals in the purchase or sale, or workmanship of goods, and commodities, other than for his own use and consumption, or the produce of his own estate, or of any subject held by him as lessee or tenant; and particularly excepting land-holders, and occupiers of land, farmers, graziers, holders of India-stock, &c. This description, doubtless, has been chosen

in preference to that of the English law, and, upon the whole, is perhaps better; but in place of the word *being*, the expression of the English and Irish statutes may be substituted, "*seeking his living as*"—This implies, that one act of trading or under-writing, holding a share in a bank, or a ship, or the like, is not sufficient to constitute one a merchant, but that his principal employment is to be looked to. And this is the more essential, because of what is added to the exception of *land-holders, farmers, &c.* "*if such persons be not otherwise under one or other of the foregoing descriptions.*"

IN the practice of England, there are many instances of improper attempts to make people bankrupts in spite of them, by alledging certain particular acts of trading, and many more, of persons attempting to take the benefit of the statutes, by superinducing on their real profession something to bring them within the description, generally with a fraudulent intention. If the addition to the exception noticed above is allowed to remain, we shall see sequestrations awarded against land-holders.

holders and farmers, almost as frequently as under the old act. It is therefore thought, that the words "*if such persons,*" &c. may be left out, and then the capacity to be a bankrupt will always depend on the question, Whether the person gets his living principally by merchandize, and not by being a land-holder, &c. In short, when a dispute occurs, it will be left with the judge to determine according to the spirit of this act, not by its letter.

To guard still farther against such II. an abuse of the law, the act might direct all merchants, traders, &c. to enter their names, professions, and places of abode, *annually*, in books to be kept by the sheriff-clerks, and to be patent at their office, paying a small fee, and declare, that persons whose names have not been so entered one year at least before the sequestration, shall not be entitled to their discharge, or to the allowance. No fair trader can object to this; and if names are found in the list, which seem to have no business there,

there, it will serve as a *caveat*. A land-lord will keep a watchful eye upon his tenant, who announces, that his farm is but a secondary object.

It has been much complained of, that those who deal with partnerships know not who they trust, the firm not expressing all the names, and sometimes not one of them. There are at the same time evident advantages in keeping up the names of houses of character. All that is bad in the practice may be remedied, by directing the names of all the partners included in the common firm, to be specified in the proposed lists.

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- III. THE bill takes in *manufacturers, artificers, and mechanics*, who, by the laws of England and Ireland, cannot *as such* be bankrupts. Mechanics cannot carry on business to any great extent without becoming traders, and under that description the law will reach them; but a mere artificer or mechanic, comes no more within the principle of the law than a mere farmer.

As

As the bill is worded, it may be IV. doubted, whether an *inn-keeper* answers the description of a person who deals in the purchase or sale of goods and commodities. Inn-keepers are not within the letter of the English statutes, but as they generally deal as wine-merchants, commissions daily issue against them. It may also be doubted whether butchers are comprehended.

THE bill says, *persons who deal in V. the purchase or sale of goods, &c.* It is submitted, that *and* should be substituted for the *or*. The English and Irish statutes join *buying and selling*, as both necessary to constitute a trader, or a person who may be a bankrupt.

THE act would be more distinct if VI. the exceptions were thrown into a separate clause, declaring that such and such persons shall not be understood to

to be comprehended in the general description.

VII. THE law of England requires, that the person who petitions for a commission of bankrupt, should be a creditor to the amount of L. 100. If two creditors join, that their debts shall amount to L. 150, and three or more L. 200. What sums are meant to be filled up in the blanks of the

Page 5th. Scots bill, the writer of these remarks has not heard; but he humbly thinks, that there is no occasion to distinguish between the cases of the petition being from one creditor, two, or more; but that the sum which must necessarily be sworn to as due to the petitioner or petitioners, ought to be fixed at L. 200, or rather perhaps L. 300, to prevent sequestrations, with all their train of trouble and expence, being awarded against people, whose estates are no objects for such proceedings. The distribution of the estates of such petty dealers, may be left to the common course of law, as amended by the very proper clauses in this bill, introducing the

the *pari passu* preference of arrestments and poindings. It is only in cases where the credits are of great value, and probably much dispersed, and the debts complicated, that sequestrations are necessary. But as small dealers who act honestly, ought to be saved from the rigour of the common law, as much as great ones, the act may allow those who owe under L. 300, to bring the process of *cessio*, without being imprisoned, and to obtain that benefit, provided the *affidavits* of two persons of character be produced, that the pursuer has always had a fair reputation, and that he has met with misfortunes in trade.

It ought to be mentioned, that creditors may petition though their debts are not yet due.

THE allowing the debtor to be heard VIII.
in limine against the sequestration, will prove a waste of time, and a source of unnecessary litigation. There is no such thing in the practice of England, where it is reckoned a sufficient guard against malicious applications, that the

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person

person applying must swear to his debt, and to the act of bankruptcy, and give bail to prove both. The debtor, if injured, may apply to supersede the commission, and sue for damages. If found entitled, the court will assign over the bail-bond, and similar proceedings may be introduced in Scotland by this act.

IX. AND even if it should be judged proper to retain that part of the bill now under consideration, there seems to be a defect in allowing the debtor to avoid the sequestration, by shewing that the debt on which the diligence proceeded, is paid, when that to the person applying may be still unsatisfied.

X. THE bill proceeds to give directions for calling a meeting of creditors in fifteen days, to chuse an interim factor, which meeting is to be attended by the Judge Ordinary. The creditors are to prove their debts. The factor is to be elected by the majority, in value

lue of the creditors who have proved. He is to find bail; and in the interim the Court of Session, or the Lord Ordinary, are to issue orders for seizing and keeping the effects, and to prevent embezzlements, &c.

As this course of proceeding has been fixed, doubtless after mature deliberation, it is with great diffidence another is suggested. But here is much time spent before any essential step is taken. Allowing only ten days for completing the diligence, six days to warn the debtor to show cause against the sequestration, and fifteen days for notice of the meeting, there are in all thirty-one days. The great matter is the election of the trustee, not of the factor; and if the former can be forwarded twenty days, it will be a considerable point gained. By the practice of England, the care of the estate before the election of assignees, (corresponding to the Scots trustee), is devolved by the Chancellor upon commissioners, and by them again upon their messengers. The office of messenger to the commissioners has become of importance, and is filled by

men of character. It will be found by experience that there must be such a department in Scotland; and that interim factors, if the present plan is adhered to, will, in nine cases out of ten, be the agent of the bankrupt; and, being once in possession, the odds will be very much in his favour for the office of trustee. This was the old system, and universally reprobated.

By the plan of this act, the sheriff-depute and substitute of the county where the bankrupt carried on his business, are generally to do the duty of the English commissioners. And it would seem that a better cannot be made of it; for this is not the time to create new offices, nor would the bankruptcies of Scotland afford enough in fees to make the office of commissioner sought after by men of character in the law, though such fees may make a desirable addition to the present income of the sheriffs. Why not then devolve the care of the estate, from the outset till the election of the trustee, upon the sheriff, and authorize him to appoint some of his officers

cers of court to act like the English messengers?

THE duty proposed to be laid on the Court of Session, and especially on the Lord Ordinary of the bills, in giving direction to prevent embezzlements, &c. will be most grievous, and either the business must suffer in point of dispatch, or the judges of that court must give orders without sufficient information. The sheriff has less to do, knows more of the circumstances in his confined sphere of jurisdiction, and is, or ought to be, accessible at all hours.

It has already been hinted, that the time proposed in the bill for citing the bankrupt to show cause, may be saved; and if what has been now suggested be approved of, the fifteen days of interval, previous to the creditors meeting, may also be saved. Immediately upon the sequestration, the person appointed by the sheriff should advertise a meeting of the creditors, to chuse the trustee.

AFTER

Page 9th. XI. AFTER several other clauses, to which there appears to be no objection, comes one, whereby the factor is directed to advertise the creditors to meet for the election of a trustee, and certain days are to be appointed in the interval for examining the bankrupt and his family before the sheriff.

If the alterations proposed above, and those that follow are adopted, the choice of the trustee may be so soon after the sequestration, that there is little chance of the estate suffering in the interval, and no great necessity for the interim factor going deep into the examination of the bankrupt. It seems to be sufficient, that the bankrupt should in this interval exhibit and swear to the state of his affairs, and deliver up his books and papers as directed by the next clause, in order that things may be ready for the trustees acting as soon as chosen. Examinations of the bankrupt must turn to very little account, unless conducted by persons intimately acquainted with his whole affairs, and not misled by

by self-interest and passion. The sheriff cannot answer that description, nor the interim factor, nor any particular creditor. We know that the examinations at Guildhall very rarely serve any good purpose. The commissioners sit silent and receive their fees, and some creditors, irritated by their recent losses, put impertinent questions, and receive evasive answers. It is not at these meetings that frauds are detected. The magistrates are always ready to receive such charges, and to follow the proper course to discover guilt.

THE examination of the bankrupt and his accomplices should, in common cases, be postponed till the election of the trustee, who ought to have the appointment of the time, with power to adjourn, and to be armed with authority to compel attendance and discovery. Bad as the times are, there need be no public or open examination in the far greater number of cases. Of the necessity the trustee ought to be the judge in the first instance, being responsible for his conduct in this as in every other particular to the Court of Session on complaint made.

THERE

THERE may, however, be some flagrant cases which call for an examination of the bankrupt before the trustee is chosen. The sheriff, therefore, on application made, and sufficient reasons set forth to him, ought to have the power at any time.

XII. THE debtor is here made to discover *all his estate and effects real and personal*. The English law mentions estates in reversion, remainder, or expectancy; analogous Scotch terms ought here to be used: as for instance, an heir of entail should discover and make over his chance of succession.

XIII. THE bill excepts from the surrender the *necessary wearing apparel of the bankrupt only*. The English acts, add *his wife and children*. It is customary in England, when the bankrupt surrenders his own and his wife's watches, trinkets, &c. that the creditors present desire them to be returned, of which a memorandum made, is by practice held to bind the other creditors. In pitiable

able cases, they restore even household furniture. It is not easy expressly to countenance this in the law itself.

IN the course of proceedings under XIV. commissions of bankrupt in England, it is so contrived that the choice generally falls on the friends of the bankrupt to be assignees. To this several things contribute. The day of the second meeting, when the assignees must be chosen by such creditors as are present themselves or by their attornies, and who have proved their debts, is too early to allow creditors at a distance to be prepared. The most pointed affidavit of the amount of the debt is required. The creditor must swear in precise terms, that the bankrupt was, at the day of suing forth the commission, and still is, indebted to him so much. The cause and grounds of debt must not only be specified in the affidavit, but produced to the commissioners. Letters of attorney must be executed and attested in a particular form, and so forth. These things not only take time, but

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even

even when done and brought to the meeting, an artful attorney has an ample field for objections to postpone the admission of the debt of one he supposes will not vote for the assignees he favours.

THE bill we are now considering, gives sufficient time for the creditors to be apprized of, and attend the meeting; but some of them may be deprived of their votes by its requiring production of the grounds of debt, and a specification of the precise sum due, and securities held, neither of which seem necessary at this period of the business. Every person, swearing himself a creditor of the bankrupt for such a sum *and upwards*, without more, ought to be allowed to vote in the choice of the trustee; and to guard against fraud, it should be enacted, that one swearing falsely and voting in consequence, shall not only be liable to the pains of perjury, but likewise forfeit double the sum sworn to, to be recovered by the trustee for the use of the estate.

ANOTHER reason for not requiring the production of the grounds of debt,
and

and a precise affidavit at the meeting for the election of the trustee, will occur to any person who has attended to the proceedings at Guildhall. The examination of the vouchers is but a secondary object that day, when all is hurry. They are, however, marked and passed, and so is the affidavit, and a re-examination is never thought of.

THE proper person to receive and examine the grounds of debt, and the oaths of the creditors ascertaining precisely what is due to them, is the trustee, and the proper time to produce them is at his leisure. Accordingly, in an after-clause of the bill, the grounds of debt are ordered to be produced *again* to him, which must be attended, in many cases, with much inconvenience.

THE bill, following the English XV. statutes, vests the right of election in the majority of creditors *in value*. Cases will happen where this must be attended with bad consequences. It is not desirable, surely, that one creditor out of fifty should have the sole

appointment of the trustee; at the same time it is reasonable that a large creditor should have more influence than a small one. It may be considered, whether a creditor should not have a vote for every L. 50 due to him, but that the votes should not exceed a certain number.

XVI. THE English and Irish laws refuse a vote to any creditor where the debt is under L. 10. The bill is silent on this head; and yet it seems necessary, in order to prevent those who are interested for mere trifles from crowding and disturbing the meeting, to fix a sum, and L. 50 seems low enough.

XVII. It is proposed by the bill, to allow the creditors to chuse two or more trustees *to succeed one another*. In England several assignees act at once, to the great dispatch of business, and without inconvenience or confusion, the act of one being the act of the whole, while each is answerable only for himself.

So

So much *per cent.* upon the money XVIII.
 recovered by way of allowance to the
 trustee for his trouble, (the rate to be Page 12th.
 fixed at the time of his entering on
 the office), may be a very exorbitant,
 or a very inadequate reward, accor-
 ding to circumstances which cannot
 be foreseen. It were better to direct
 the trustee to make up the bill of costs
 and charge for his trouble, before de-
 claring each dividend; and to give a
 power to any one or more creditors to
 a certain extent, if the charge is
 deemed unreasonable, to insist that the
 bill should be modified or taxed; and
 the clerks of Session, by rotation,
 may be constituted taxers of such bills,
 being paid for their trouble out of the
 estate.

IF the creditors act wisely, the trus-
 tee will generally be a merchant or
 trader, and not a person belonging to
 the law. He must, however, em-
 ploy one of that profession under him.
 Is the agent's trouble meant to be in-
 cluded in the allowance mentioned in
 the bill?

THE

THE election of the trustee is to be reported to, and, it ought to be added, confirmed by the court. A step which may be necessary, as affording an easy and early opportunity to the creditors to object, in case the election has not been fairly obtained.

XIX. THE bill then directs, that the court
 Page 13th. shall issue an order upon the bankrupt, to convey his estate and effects to the trustee; and if he fails within ten days, the court is to pronounce decree of adjudication. It will be a saving of time in many cases, if the order here mentioned is dispensed with, and the decree instantly pronounced. An adjudication is certainly as good a title to effects in Scotland, as a voluntary conveyance. And if it be alledged, that it may be proper sometimes to establish a feudal title in the trustee, which may be done cheaper, by means of the last, the act may direct that, in aid of the general adjudication, the bankrupt shall convey specially, whenever required by the trustee, upon pain of imprisonment, &c. This alteration
 appears

appears even necessary, when it is considered, that the bankrupt may have estates and effects in England or in foreign parts, which must be conveyed according to the forms of the law of those countries, and such conveyance cannot be prepared in ten days.

For the discovery of effects of the bankrupt after the assignment, the English law allows a reward to the discoverer (5th Geo. II. c. 30. § 20.). Ought not the Scotch act to contain something similar?

THE next clause in the bill enacts, that "the whole estate, whether real or personal, belonging to the bankrupt, at the period of the sequestration, shall become a fund of division amongst those *who were his creditors, prior to the date of the application, and none else.*"

It is the law of England, that no debt arising after the commission is awarded, can be proved against the estate, which, however, has been so far relaxed,

relaxed, as to let in obligations of which the period of performance is not yet come; bottomry and insurance debts, though the losses are subsequent, &c. But there are cases still, where persons, who have fairly contracted with the bankrupt when in business, are, by the law so standing, and because they cannot swear, that, at the date and suing forth the commission, they were creditors for a precise sum, excluded the benefit of the dividends. And if the words now quoted, or the like, are allowed to remain in the Scots act, the same unjust consequences must follow.

For instance, a co-obligant, with or without a bond of relief, paying the debt after the sequestration, cannot, in direct terms, swear, that he was a creditor prior. This may be called too critical, though it requires not only the antecedent obligation, express or implied, but the subsequent act of payment, to constitute him a creditor, and certainly a demand so circumstanced, would not be admitted under the statutes in England. But this is not the only instance. Drawing on a corre-
spondent



spondent without effects, is too well known in Scotland. The correspondent may be under acceptance at the date of the bankruptcy, and obliged to pay subsequent. He may even not have accepted at that date, and do it afterwards *bona fide* before notice. In complicated bill-transactions, demands may arise years after the bankruptcy, from causes which existed before it. Other cases upon contingent bargains may be figured, and some shall be afterwards noticed.

THE same clause enacts, that money paid by the debtor to his creditor, *after a sequestration is applied for*, shall, if the sequestration is awarded, be restored and no exception is made, though the creditor may have *bona fide* made the demand, and taken and spent his own money in perfect ignorance of what was going forward. An innocent man is thus to be punished; perhaps ruined, because his debtor chose to hold his tongue.

THIS is the case, which the English
act of 19^o Geo. II. c. 32. states in the
D preamble,

preamble, as what would be a *discouragement to trade, and a prejudice to credit in general*; and therefore enacts,
 “ That no *bona fide* creditor of a bankrupt for goods sold, or by bill of exchange, shall be liable to refund to the assignees, any money received from the bankrupt *bona fide*, before the date of the commission, and before the receiver knew of the bankruptcy, or of his being in insolvent circumstances.” It is not very clear why the act mentions only the price of goods sold, and money upon bills.

XXIII. A FIRST dividend is ordered to be made in twelve months, and a second when twenty-one months have elapsed from the date of the sequestration. Every body knows that the similar positive enactments and orders of the English and Irish statutes, are seldom or never followed out, and that disobedience is winked at, because it is found impossible to comply. It does not seem adviseable, therefore, servilely to copy them. A remedy was attempted by a law passed in Ireland, subsequent

Page 18th
and 19th.

quent to the main act, but as the periods were still fixed, the evil was not removed. *The time for making dividends must depend on circumstances, of which the trustee is the proper judge.* Some rules ought, however, to be established, to prevent his delaying unnecessarily, through negligence, wantonness, or from worse motives, and others, to compel the creditors to prove their debts in time. The following are submitted to consideration.

1st. THAT the trustee shall, immediately after his election, publish advertisements in the Gazette, and Edinburgh news-papers, requiring the creditors to produce to him their grounds of debt, and depositions on the verity thereof, and such of them as are prevented from proving, at least to lodge *claims*. In England, *claiming* is used in contradistinction to *proving*. A *claim* is no more than a memorandum of the debt, which any person may sign and exhibit.

2^d. THAT proofs of debts brought in within six months, shall be received without any fee. Those in three months after expiry of the six, are not

to be received but on payment of $2\frac{1}{2}$ *per cent.* of the sum sworn to, and every subsequent three months $2\frac{1}{2}$ *per cent.* more. The sum so paid to be for the benefit of all the creditors.

3d. THAT the trustee is to be judge in the first instance, whether debts should be admitted or rejected, and to what extent. He shall take an oath to act impartially, as the commissioners in England and all judges do.

4th. THAT the trustee shall give a receipt for the grounds of debt and deposition, and within one month after the date of such receipt, shall give notice to the creditor or his agent, that he has considered the writings produced, and has resolved to admit the debt, as proved in whole or in part, or to reject it, or that he desires the party to attend him with information, &c. specifying his reasons.

5th. THAT a creditor, whose debt is thus rejected in whole, or in part, may immediately apply for redress by petition to the Lords of Session, or the Lord Ordinary on the bills, which shall be served upon, and answered by the trustee; and the court shall proceed summarily

marily and if they find the petitioner in the wrong, he shall pay double costs.

6th. That any creditor, who apprehends the trustee to have done wrong in admitting another creditor, may apply in like manner by petition, to be answered by the party interested; and if the petitioner is found to be in the wrong, he shall pay triple costs.

7th. THAT the trustee may make a dividend of the sums recovered, at any time after the expiration of six months from his being appointed, among the creditors of whose debts the proofs have been admitted, setting a-part a rateable proportion for the creditors who have *claimed* but not proved, or as to whose proofs questions are depending before himself, or the Court of Session.

8th. THAT if twelve months expire without a dividend made or declared, the trustee shall within fourteen days thereafter, make up a state of the funds recovered and outstanding, and of the debts proved and claimed, and annex thereto a memorial, setting forth fully and explicitly his reasons for not making a dividend; which state and memorial

memorial he shall lodge in the hands of the sheriff-clerk, together with an affidavit, that all the facts therein stated are true. And any creditor may have a copy of said state, memorial and affidavit, from the sheriff-clerk, upon paying some small fee. That a like state, memorial and affidavit, shall be made and lodged every three months thereafter, till a dividend is declared. And the same course shall be observed when nine months have expired, after a first dividend, and no second declared, &c.

9th. THAT it shall be lawful to any creditor or creditors, whose debts amount to L. 100 in whole, if not satisfied with the trustees reasons for postponing the dividend, to present a petition to the Court of Session, or Lord Ordinary, annexing a full and exact copy of the last state, memorial and affidavit of the trustee. That the court may or may not appoint the trustee to answer the petition, and the petitioner to reply; and upon considering the case, may either issue their order for making a dividend, or refuse

fuse the petition, in which last case the petitioner shall pay double costs.

10th. THAT if upon such occasions, the conduct of the trustee appears wrong, the court may inflict such censure and punishment by deprivation, fine, imprisonment, or otherwise as the case merits.

GENERAL meetings of creditors to receive dividends, are unnecessary. Page 19th. XXIV.
The dividend should be advertised, and there is no fear of those entitled applying for payment.

THE declaration, that no creditor shall draw any share in respect of distributions made before proving his debt, has certainly crept into the bill through inadvertence, as it is clearly unjust. It is contrary to the established practice of England. One who proves after a dividend made, *shall not disturb it*; but if there is another distribution, he is entitled to take from the first end of it, as much as to put him on a footing with the other creditors, and XXV.

and it is the balance only that can be rateably divided. There may be good reasons for his delaying to prove, but, to accelerate the proofs, it has been already proposed to impose certain fines on those who delay, increasing in proportion to the time, and this without considering their reasons, as it is not easy to judge of their propriety.

XXVI. WHEN a second or other dividend comes to be made at the distance of eighteen months from the sequestration, the advertisement ought to be made three months before, certifying those who have lodged *claims*, that if they do not, one month before the time proposed for dividing, substantiate them by proofs, no share of the funds will be set a-part, and the shares set a-part on former occasions, will be brought into the common mass.

XXVII. ONE who lends his money upon double security, or has more persons than one bound to him, is entitled to state his full demand against one and all

Page 19th,
last clause.

all the obligors and their estates; nor does it seem just to restrain him from drawing a dividend corresponding to the whole from the estate of A, though he may prior to the proofs have received one from B. He is indeed so restrained in England, not from any rule in their laws, like that introduced here, but from the terms of his oath, *that his debt was, and is so much.* People get over this by a quirk not strictly justifiable. Both their debtors being bankrupts, they *claim*, but do not *prove*, till the dividends are declared, and then judge which of the estates they can swear most against.

THE clause concludes with declar- XXVIII.
 ing, that one shall never draw more Page 20th.
 than compleat payment of his debt,
 which, to be sure, is justice and law
 every where. Yet, in England, persons
 having several different estates bound to
 them, and drawing from each in respect
 of their whole debt, have been known
 to take forty shillings in the pound.
 This happens from their not being
 E obliged

obliged to exhibit a state of their debt on each dividend being paid them.

XXIX. THE proviso may, it is thought, be wholly omitted. Equipage is a vague term; a cart to carry a sick wife to church is an equipage. And after a
 Page 22d. complete surrender and discharge fairly obtained, why should industry be restrained? or why should a person in that situation be prohibited from purchasing and keeping a small real estate, while he is allowed to enjoy a personal estate to the greatest extent? We should be cautious of unnecessarily inserting what the wisdom of England has proscribed.

XXX. THE allowance here proposed to be made for the bankrupt's subsistence, will introduce great abuses. This is
 Page 23d. likewise unknown in the practice of the people in the world most remarkable for humanity and generosity. When the bankrupt can be useful to his creditors, he should be paid for his trouble, and there ought to be a clause to
 compel

compel him to attend the trustee at all times when required, even after the discharge, on pain of forfeiting it, his travelling charges, and a small sum daily being paid out of the estate, which sum the act should fix. In England it is 2s. 6d. *per diem*.

THE allowance in money to the bankrupt, in proportion to what his estate pays, is borrowed from the law of England, with this difference, that there he is entitled to it as of right; here it is proposed to be made dependent on the favour of the creditors, which seems to be an improvement, but it may be as well omitted altogether, as productive only of trouble to the trustee. Four-fifths in number and value of the creditors fairly convened, will not concur in granting it in ninety-nine cases of a hundred. A pack'd meeting may indeed give it, if that is to be encouraged. Even in England, the law is constantly evaded. It is tacitly understood between the bankrupt and his creditors, that the former

XXXI.

Page 23d.

surrenders his claim, when the latter sign the certificate.

XXXII. Page 24th. IN England and Ireland, the judgments of the Lord Chancellor in matters of bankruptcy are final: Why should not those of the Court of Session be declared so likewise?

XXXIII. THE bill (if rightly understood) permits the creditors to take both the body of the bankrupt and a share of his effects, and his person is only to be freed from arrest by the Court of Session's issuing a protection with consent of four-fifths of the creditors. The custom of England is better; that the creditors may take either the person or the effects, but not both; and even when the person is taken, the debt will be cut off by the certificate, for which reason the creditor is made a party to that part of the proceedings, and may dissent to the certificate.

No

No provision is made for the case of XXXIV.
a creditor, attaching effects of the debtor to which the sequestration does not extend. The commissioner and assignees in England have assumed a power of excluding from any share of the estate in their hands, persons who seize effects in places not subject to the Chancellor's jurisdiction, which seems to be perfectly just.

No notice is taken of the case of XXXV.
joint and separate creditors. By our law the partnership estate must be first applied to pay the partnership debts, in total exclusion of the creditors of the individual partners, while at the same time, the private estates of those individuals are liable to be attached by the partnership-creditors, as much as by the private. The law of England is the same, but equity has established certain regulations in the distribution of joint and separate estates, under commissions of bankrupt, which must be adopted in Scotland,

land, at least in part, otherwise confusion will ensue, and a great expence be incurred, whenever a sequestration is awarded against a partnership. When a commission issues against two or more in company, the Chancellor, to save commissions being taken out against the several partners, on petition of their private creditors, allows them to prove their debts under the joint commission, and directs the commissioners and assignees to keep distinct accounts of the joint and separate estates, to apply the joint estate, in the first place, to the discharge of the joint debts, and if there be any surplus, to apply the same to the discharge of the separate debts, according to each partner's share in the company; *and to apply the separate estate, in the first place, in discharge of the separate debts, and if there be any surplus, to the joint debts.*

WHETHER it would be proper to vary the law of Scotland, by adopting this seemingly equitable rule, is submitted; but it will be evident, that some course must be taken in the case of partnerships to avoid the expence of different sequestrations, and
not

not to confound the separate estates with the joint estate. Separate creditors are not allowed in England to vote in the choice of assignees of the joint estate, though they have a contingent interest. It is plain, that joint creditors, as the law of Scotland now stands, must vote in the election of the trustee for the separate estate, along with the separate creditors; and thus there may be as many trustees as there are partners and one more, all acting independently, and their proceedings clashing with and retarding one another. It is equally plain, that each partner must have a separate discharge in which the joint creditors and his own private creditors must concur, otherwise one man is concluded by the act of another; and thus one partner may get a discharge, while it is refused to the rest, though their merits be precisely the same.

WHEN a sequestration is awarded against a person who is a partner in a company for his private debts, the company remaining solvent, what effect ought it to have? It seems unjust and inexpedient, that it should break up the

the partnership, and therefore, a rule ought to be established, that his private creditors must take his share as at last balancing.

XXXVI. This opportunity might be taken of explaining the law with respect to the partners binding the joint estate by *deeds*; whether the firm shall do it, or the names of all the partners, and whether the junction of other obligors differences the case.

SOME years ago, a Scots-house in London stopped payment. The two partners, alongst with some of their friends, had borrowed large sums in Scotland, upon bonds in the Scots form, which were signed by the partners as individuals, and the other obligors, binding all jointly and severally; and the money was applied sometimes to the use of the partners, and sometimes to the use of the others, with which circumstance the lenders did not conceive that they had any concern. On the creditors offering to prove these bond-debts against the joint estate of the partnership, it was objected,

objected, that it was not lyable; that the joint estate of all the obligors (if any such could be found) was bound, and the separate estate of every individual obligor, but not the estate of two out of a greater number. And it was adjudged by Lord Thurlow, that these bond-creditors could not be admitted without proof that their money actually came to the use of the partnership. The same judgment would, in all probability, be given in the House of Lords, in a similar case arising in Scotland upon this act.

BOTTOMRY, respondentia, and insurance debts, when the loss may or may not happen, do not come within the description of *debts which are certainly payable, but the time of payment not yet come*, (p. 19.). The following regulation, copied from the English act, 19th Geo. II. c. 32. ought therefore to be introduced into the Scots: “ That the
 “ obligee, in any bottomry or respondentia bonds, and the assured in any
 “ policy of insurance in the course of
 “ trade, made and entered into upon a
 F “ good

XXXVII.

“ good and valuable consideration *bo-*
 “ *na fide*, shall be admitted to claim,
 “ and (after the loss or contingency
 “ shall have happened) *to prove* his,
 “ her, or their debt or demands, in
 “ respect of such bond or policy of
 “ insurance, in like manner as if the
 “ loss or contingency had happened
 “ before the time of the issuing of
 “ the commission of bankrupt against
 “ such obligor or insurer, and shall be
 “ entitled unto and receive a propor-
 “ tionable share of such bankrupt’s
 “ estate, in the same way as if such
 “ loss or contingency had happened
 “ before the commission issued, and
 “ all and every person or persons
 “ against whom any commission of
 “ bankrupt shall be awarded, shall be
 “ discharged of and from the debt or
 “ debts owing by him, her, or them,
 “ on every such bond or policy of in-
 “ surance, and shall have the benefit
 “ of the statute, as if such loss or
 “ contingency had happened, and the
 “ money due in respect thereof had
 “ become payable before the time of
 “ issuing such commission.”

THE

THE bankrupt may also be under XXXVIII.
 personal obligations to pay annuities
 on lives and money upon contingency,
e. g. an annuity to a wife in case
 she survives her husband. To meet
 such cases, the act should direct a va-
 lue in present money to be put upon
 uncertain claims, and the creditors to
 draw in proportion to that value, and
 the bankrupt's obligation to cease. If
 the annuities or contingent claims are
 secured upon land or otherwise, it
 should be left to the choice of the cre-
 ditors to take the value or keep the se-
 curity, the collateral security of the
 bankrupt ceasing.

THERE are several cases specified in XXXIX.
 the Irish and English statutes, (besides
 the general one of not conforming),
 where the bankrupt shall forfeit the
 benefit otherwise intended for him,
 and it seems to be reasonable that the
 same provisions should be adopted in
 Scotland.

1st. If the bankrupt shall not have kept regular books since his commencing business, and balanced them once every two years at least, and preserved the books and balance sheets.

2^d. If he shall have given to, or with any of his children, above L. 100, without being able to prove that at the time he was worth that sum, besides paying all his debts. This may be extended to a settlement upon a wife, or a gift to any friend or relation. There was an instance not many years ago, of a London trader making a present of a considerable landed estate in Scotland to his brother, while he was not worth a shilling; and, to the reproach of the law, the brother keeps the estate, and the bankrupt got his certificate.

3^d. If he shall be proved to have lost above L. 5 in one day, or L. 300 in any one year, by gaming or stock-jobbing.

4th. THE English and Irish acts have the following clause: " In case any
" commission of bankrupt shall issue
" against any person or persons, who
" shall have been before discharged
" by

“ by virtue of this act, or shall have
 “ compounded with his, her, or their
 “ creditors, or delivered to them, his,
 “ her, or their estate and effects, and
 “ been released by them, or been dis-
 “ charged by any act for the relief of
 “ insolvent debtors, that then, and in
 “ such cases, the body and bodies only
 “ of such person and persons, conform-
 “ ing as aforesaid, shall be free from
 “ arrest and imprisonment, by virtue
 “ of this act; but the future estate
 “ and effects of every such person or
 “ persons, shall remain liable to their
 “ creditors, as before the making of
 “ this act, (the tools of trade, the ne-
 “ cessary household goods and furni-
 “ ture, and wearing apparel of such
 “ bankrupt, and his wife and children,
 “ only excepted), unless the estate of
 “ such person or persons, shall pro-
 “ duce, clear of all charges, sufficient
 “ to pay every creditor under the said
 “ commission, fifteen shillings in the
 “ pound for their respective debts.”

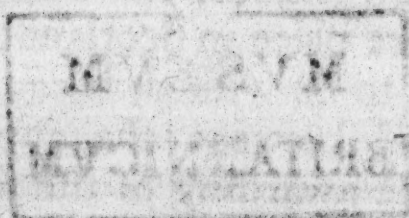
In England debts due to the King XI,
 are not preferable to those due to pri-
 vate

vate persons, after a commission of bankrupt has been awarded, unless the writs of extent, &c. were taken out prior. The reason is, that the commission operating as a compleat investiture of the effects in the commissioners for the benefit of the whole creditors, they cannot thereafter be seized as belonging to the bankrupt. But as the bill now stands, the same thing will not take place in Scotland, though certainly to be wished, because there is an interval between the application for, and the awarding of the sequestration, in which the King's writs would be compleatly executed.

XLI. WHETHER the following clause in the Irish act ought to be introduced into the Scots, merits consideration.

“ In all cases where a commission
 “ of bankruptcy shall be awarded
 “ against any member of the House of
 “ Commons, and shall not be superseded within six months from the
 “ time of issuing thereof, and the creditors proving their debts under the
 “ same, shall not be paid or satisfied
 “ within

“ within six months, or security given
 “ to answer the same, when the amount
 “ is disputed; the commissioners are
 “ to certify the fact to the Speaker of
 “ the House of Commons; the seat
 “ shall become vacant, a new writ
 “ shall be issued, and the bankrupt
 “ shall be ineligible till all his debts are
 “ paid.”



F I N I S.

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" within six months, or sooner given
" to answer the same, when the amount
" is ascertained; the commissioners are
" to certify the fact to the Speaker of
" the House of Commons; the same
" shall become vacant a new writ
" shall be issued, and the bankrupt
" shall be ineligible, till all his debts are
" paid."



I 1 N 1 2

